SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-913

PHILIP ZANE and JEROME E. SILVERMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK	3
STATEMENT OF FACTS IN SUPPORT OF PETITION	5
ARGUMENT—The decision of the Court of Appeals directly conflicts with an applicable and controlling decision of this Court	10
CONCLUSION	20
APPENDIX:	
A—Decision and Opinion of the United States Court of Appeals for the Second Circuit	1a
B—Oral Opinion of Judge Wyatt	7a
C—Order of the United States Court of Appeals Denying Petition for Rehearing	10a
Order of the United States Court of Appeals Denying Petition for Rehearing In Banc	12a
D—Rule 33, Federal Rules of Criminal Procedure	14a
Statutory Provisions Involved	15a

PAGE

Cases Cited

Communist Party v. Subversive Activities Control Board, 351 U. S. 115 (1956) 20

Mesarosh v. United States, 352 U. S. 1 (1956) ..10, 11, 18, 19

United States v. Chisum, 436 F. 2d 645 (9th Cir. 1971) 20

United States v. Palumbo, 401 F. 2d 270 (2d Cir. 1968), cert. denied 394 U. S. 94 11

Statutes Cited

Federal Rules of Criminal Procedure, Rule 33 .....2, 3, 5

15 U.S.C.:

Sec. 78o 3, 4

Sec. 78ff 3, 4

18 U.S.C.:

Sec. 2 ..... 3, 4

Sec. 371 3

Sec. 1505 3

Sec. 1621 ..... 3, 4

28 U.S.C.:

Sec. 1254(1) 2

Regulation Cited

17 C.F.R.:

Sec. 240.12b-20 ..... 3, 4

Sec. 240.15d-1 ..... 3, 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Philip Zane and Jerome E. Silverman pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 4, 1974.

Opinion Below

The opinion of the Court of Appeals, which has not yet been reported, is reprinted as Appendix A, annexed here-

to. No written opinion was rendered by the United States District Court, Southern District of New York; the District Court's oral opinion, rendered from the bench, is reprinted as Appendix B, annexed hereto.

The opinion of the Court below affirmed the District Court's denial of petitioners' motion under Rule 33 of the Federal Rules of Criminal Procedure for a new trial based upon newly discovered evidence. The motion for a new trial was made following the Court of Appeals' affirmance of petitioners' convictions on direct appeal, reported at 495 F.2d 683. Petitioners' application to this Court for a writ of certiorari seeking review of the Court of Appeals' original decision was denied by this Court by Order dated October 21, 1974 (U.S.) (No. 73-1878).

Jurisdiction

The judgment of the Court of Appeals was entered on November 4, 1974. A timely petition for rehearing, with a suggestion for hearing *en banc,* was denied on December 27, 1974 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the decision of the Court of Appeals, in affirming the District Court's denial of petitioners' motion for a new trial, directly conflicts with a controlling decision of this Court.

Statutory Provisions Involved

Rule 33, Federal Rules of Criminal Procedure

Title 15, United States Code, §78o

Title 15, United States Code, §78ff

Title 18, United States Code, §2

Title 18, United States Code, §371

Title 18, United States Code, §1505

Title 18, United States Code, §1621

17 C.F.R. §240.15d-1

17 C.F.R. §240.12b-20

(The above provisions are set forth in Appendix D annexed hereto).

Statement of Proceedings in the United States District Court for the Southern District of New York

Petitioners Philip Zane and Jerome E. Silverman were charged by indictment in the United States District Court for the Southern District of New York, with others, as follows:

> Count 1 charged a conspiracy among Zane, Silverman, and others (including one Akiyoshi Yamada) to knowingly and wilfully file with the Securities and Exchange Commission (hereinafter "SEC") a false and misleading Form 10-K annual report for Microthermal Applications, Inc. (hereafter "Microthermal") for the fiscal year ending January 31, 1970 (18 U.S.C. §371).
>
> Count 2 charged Zane, Silverman, and others with the substantive offense of knowingly and wilfully

filing (and aiding and abetting the filing of) the false and misleading Form 10-K referred to in Count 1 (15 U.S.C. §78o; §78ff; 17 C.F.R. §§240.15d-1, 240.12b-20; 18 U.S.C. §2).

Count 3 charged Zane and Silverman with obstruction of justice by the submission to the SEC of "fraudulently" prepared documents allegedly designed to "cover up" the receipt by Zane and Silverman of an alleged bribe which they had allegedly received to induce their participation in the offenses charged in Counts 1 and 2 (18 U.S.C. §§ 1505, 2).

Counts 4 and 5, asserted against other defendants, were severed before trial.

Counts 6-12 charged Zane with perjury for testimony given before the SEC in connection with an SEC investigation into the matters specified in Counts 1-3 (18 U.S.C. §1621).

Trial of the action against Zane and Silverman (and against a co-defendant, Robert Persky*) commenced on May 7, 1973 before the Hon. Inzer B. Wyatt and a jury. On June 12, 1973, the jury returned a partial verdict, acquitting petitioners on nine of the thirteen counts charged against them (Counts 1 and 3 as to both petitioners, and Counts 6, 7, 9, 10, and 11 as to petitioner Zane), and reported themselves unable to reach agreement as to the remaining counts. After an *Allen* charge and several more hours of deliberations, the jury returned a second partial verdict, convicting both petitioners on Count 2, and reporting themselves unable to agree as to Counts 8 and 12 against petitioner Zane.

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* Co-defendants Fisher, D'Onofrio and United States Secretarial Institute, Ltd. were severed. Co-defendant Kaplan pleaded guilty to one count.

On September 6, 1973, both petitioners were sentenced to two-year terms on Count 2, with four months to be served in the custody of the Attorney General and two years probation.

During the course of petitioners' direct appeal from the judgment, they learned of material new evidence which had been previously unknown and unavailable to them. Their motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure based upon this newly discovered evidence was denied by the District Court, and the denial was affirmed by the Court of Appeals. It is from this decision of the Court of Appeals that the instant petition is respectfully filed.

Statement of Facts in Support of Petition

Petitioners both testified at trial and denied any knowledge of or participation in the crimes charged against them.

The prosecution's case was built primarily on the testimony of two witnesses, Akiyoshi Yamada and John Galanis. Both witnesses were admitted active participants in the conspiracy, and the issue of fact for the jury was whether to believe or disbelieve their testimony that the petitioners, notwithstanding petitioners' protestations of innocence, were among those who had joined with Yamada and Galanis in the conspiracy. As the Court of Appeals noted in its original opinion affirming petitioners' convictions, "The serpentine course of the conspiracy was traced at trial largely through the testimony of Galanis and Yamada." (495 F.2d at 688). As the Court of Appeals further acknowledged in its opinion affirming the trial Court's denial of petitioners' motion for a new trial, Yamada "gave extensive testimony implicating Zane [and]

Silverman not only on the charge on which they were found guilty but on various other counts on which they were acquitted." (Appendix A, pp. 2a-3a).

Yamada, during the course of his trial testimony, admitted to the commission of numerous securities frauds, all of which were committed before he struck a deal with the Government and became a cooperating witness. In addition, he had committed perjury while testifying before the S.E.C. regarding his various securities frauds. Yamada agreed to plead guilty to three one-count informations before a single judge, with the Government's commitment that he would not be prosecuted for any other offenses. He had not yet been sentenced at the time he testified at petitioners' trial, although he had learned of the lenient (six months plus probation) sentence that his partner in crime, Galanis, had received (T. Tr.* 1574-1596, 1599-1606, 1676-1680).

Shortly after the jury returned its verdict in petitioners' trial, Yamada was indicted by a grand jury in the United States District Court for the Southern District of New York on sixteen counts (74 Cr. 100). In substance, the indictment alleged that Yamada was sentenced (shortly after his testimony and the jury's verdict in the prosecution of petitioners) by the Hon. Irving Ben Cooper to two years' imprisonment, five years' probation, and a $30,000 fine for the various offenses to which Yamada had pleaded guilty as part of his agreement with the Government. The indictment alleged that for the next seven weeks after his sentencing, Yamada engineered and perpetrated a scheme to defraud Judge Cooper "by submitting false, forged, fictitious and fraudulent documents and information to the Court" in connec-

* The designation "T. Tr." followed by a number refers to page numbers of the trial transcript.

tion with a subsequent motion brought by Yamada before Judge Cooper for reduction of sentence. To effect this scheme, Yamada was alleged to have caused the sending of numerous letters to Judge Cooper, by various individuals purportedly active in community services, attesting to Yamada's fine character and previous good deeds, and purportedly requesting that leniency be extended by the Court to Yamada. These letters, according to the indictment, were completely false, forged, and, in at least one instance, typed on stationery whose printing Yamada caused and which bore the name of a non-existent institution. Yamada's scheme as charged was an elaborate and brazen series of lies and fabrications to a United States District Judge in an effort by Yamada to obtain leniency for himself, at whatever cost.

On April 15, 1974, Yamada entered a plea of guilty to six counts of the indictment against him. In substance, the conspiracy count to which Yamada pleaded guilty charged him with having conspired with others, for a fifty-day period beginning about a month after his testimony in petitioners' trial, to defraud the United States and Judge Cooper in Judge Cooper's official capacity as a United States Senior District Judge for the Southern District of New York by submitting false, forged, fictitious, and fraudulent documents in support of his motion for reduction of sentence; Counts 12-16, to which Yamada also pleaded guilty, charged him with five substantive offenses of knowingly and wilfully submitting false, fictitious and fraudulent statements to Judge Cooper in support of his motion for reduction of sentence.

Yamada, before testifying at petitioners' trial, had previously testified under oath before the S.E.C. with respect to (among other things) the same matters about which he testified at trial, except that before the S.E.C. he had testified to his lack of knowledge of the Microthermal con-

spiracy, which would include lack of knowledge of petitioners' alleged involvement in that conspiracy. His testimony before the S.E.C. was completely different from his testimony at petitioners' trial concerning his purported knowledge of petitioners' alleged involvement in the conspiracy, and the jury was faced at trial with the issue of whether Yamada had perjured himself before the S.E.C. (as Yamada and the Government claimed) or was perjuring himself at trial (as petitioners claimed.) See 495 F.2d at 696.

In an attempt to persuade the jury to resolve this issue against Zane and Silverman, Yamada was pictured at trial by himself and by counsel for the Government as being a man who, having violated the laws, was now repentant, entirely credible, and ready to tell the truth and bear whatever punishment was necessary for his previous offenses in order to face life with a fresh start. Government counsel, even before Yamada testified, said in his opening statement to the jury, "Yamada stepped forward and said 'I did these things and I want to pay for these things'" (T. Tr. 58). Indeed, Government counsel in his opening statement anticipated cross-examination by defense counsel into Yamada's deal with the Government by characterizing any such inquiry as "a tremendous amount of wind and air." (T. Tr. 57). Yamada himself testified, "I agreed to tell the absolute truth. . . . I was going to start anew, and start a new life" (T. Tr. 1577). Government counsel, in summation, claimed that the Government's cooperating witnesses (including Yamada), in this and in others of "these financial cases," "finally said, 'Enough, I want to tell the truth'" (T. Tr. 4009-4010), and that Yamada "was honest" and his testimony had "the hallmarks of credibility" (T. Tr. 4015).

As Yamada's crimes immediately after his testimony against petitioners clearly establish, the picture of Ya-

mada which the Government painted at petitioners' trial was entirely false; to the contrary, a grand jury painted Yamada as a liar, and his plea of guilty to six counts of the indictment confirmed the grand jury's allegations and absolutely refuted the claim made by the Government at trial that Yamada was a man worthy of any belief or one whose testimony was worthy of any credence. Moreover, Yamada's guilty plea to six counts furnished unmistakable and overwhelming evidence—unavailable at trial—of the lengths to which Yamada would lie and construct a web of total deceit in order to alleviate his own problems with the law.

In this respect, the Government's position with respect to Yamada's sentencing on the six counts to which he pleaded guilty is of extreme significance. The Government submitted a sentencing memorandum to the Hon. Morris E. Lasker (to whom 74 Cr. 100 had been assigned) which not only urged Judge Lasker to impose a severe punishment on Yamada, but additionally characterized Yamada's newest crimes in terms which clearly warrant the granting of a new trial in the instant case. The Government memorandum stated that the crimes (committed within a short time of his testimony at petitioners' trial) "are matters of the utmost gravity which . . . require a stern response by the Court", and the Government urged that Yamada "should be punished by a substantial term of imprisonment consecutive to the term which [Yamada] is presently serving" (A*52, A67). The Government also stated in its sentencing memorandum that "in addition to the letters set forth in the indictment, the Government

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* The letter "A" followed by a number designates page reference to "Appellants' Appendix" on their appeal to the Court of Appeals from the District Court's denial of their motion for a new trial.

would have proven [at trial] that Yamada solicited additional fake letters" (A60). Moreover, in the Government's sentencing memorandum to Judge Lasker, the Government further stated:

> "[T]he fraud perpetrated by Yamada has substantially vitiated his usefulness as a Government witness in any future prosecutions." (A61)

This was also recognized by Judge Lasker himself, who stated at Yamada's sentencing:

> "it is going to make Mr. Yamada himself less useful as a witness than he would have been otherwise." (A37)

ARGUMENT

The decision of the Court of Appeals directly conflicts with an applicable and controlling decision of this Court.

It is respectfully submitted that the Court of Appeals' decision, in affirming the District Court's denial of petitioners' motion for a new trial, is in direct conflict with a controlling decision of this Court, *Mesarosh* v. *United States*, 352 U.S. 1 (1956).

In *Mesarosh*, petitioners were convicted of a Smith Act violation. While their appeal was pending before this Court, the Solicitor General called this Court's attention to the fact that "the Government, on the information in its possession, now has serious reason to doubt the truthfulness of" testimony given in other judicial proceedings by one of the seven witnesses who had testified against petitioners (352 U.S. at 4). The Solicitor General stated,

however, that the Government's position was still that the testimony of the witness given at petitioners' trial "was entirely truthful and credible" (352 U.S. at 4). Under these circumstances, this Court held:

> "[The witness]'s credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." 352 U.S. at 9.

The circumstances of the instant case are even more compelling than those of *Mesarosh*. In *Mesarosh*, the Government's witness was discredited only by the Solicitor General's assertion, but not by any conviction, whereas in the instant case Yamada pleaded guilty to six separate crimes constituting a blatant, flagrant, and premeditated series of lies and fabrications to a Federal District Judge. Yamada's crimes followed his testimony at trial by only a matter of weeks. Moreover, in *Mesarosh*, the Solicitor General "was not prepared to say the witness . . . was guilty of perjury" (352 U.S. at 8), whereas Yamada's confessing to his newest crimes are unequivocal proof of Yamada's lies.

Yamada's new convictions are relevant to his credibility not only in the narrow sense that any conviction of a crime bearing on veracity is relevant (cf. *United States* v. *Palumbo*, 401 F. 2d 270 (2d Cir. 1968), cert. denied 394 U.S. 94); more significantly, under the circumstances of the instant case Yamada's crimes against the Court were intimately connected with the primary issue of his motivation to lie at the trial of Zane and Silverman. The

jury in this case had to evaluate the extent to which Yamada would lie in order to lessen his own punishment, and the extent to which he had finally decided, in the words spoken by Government counsel to the jury, to "step forward and s[ay] 'I did these things, and I want to pay for these things'" (T. Tr. 58). Yamada's newest crimes constitute overwhelming proof that Yamada, even after having purportedly turned over a new leaf and having become an honest man, so deeply wished to escape punishment that he would create an absolutely fictitious series of lies and deceits towards this end, even to the extent of violating the sanctity of a Federal Court. The picture of Yamada which was painted at trial as that of a repentant man who had decided to tell the truth and bear his punishment was, in a word, untrue. This evidence, previously unavailable, would have proven to the jury the extent of Yamada's desperation, and the outrageous extent to which Yamada would create a total fiction out of thin air to try to help himself.

Moreover, Yamada's newest crimes are firm evidence that he would not and did not live up to his bargain with the Government. He testified at trial that pursuant to his bargain with the Government "I agreed to tell the absolute truth" and that he intended to live up to his agreement (T. Tr. 1577). However, as the Government's sentencing memorandum before Judge Lasker stated, "the very crimes which are the subject of the instant charges demonstrate that Yamada violated his agreement with the Government almost as soon as he had made it" (A61). In fact, Yamada's violation of his agreement with the Government was so flagrant that the Government "considered prosecuting this defendant for his various unprosecuted frauds" which the Government had previously agreed not to prosecute (A61).

The District Court, in denying petitioners' motion for a new trial, relied for its holding on the assertion that Yamada's new crimes "seem to me to be cumulative on impeaching his credibility", for the reason that the scope of Yamada's previous criminal offenses had been brought to the jury's attention during the course of petitioners' trial. Notwithstanding this rationale of the District Court, however, it is respectfully submitted that Yamada's new crimes are not simply cumulative to his other crimes. There was absolutely no evidence presented or available at trial to show that he had been convicted of any other crime or had committed or contemplated any other misconduct after having allegedly turned over a new leaf; nor was there any evidence adduced at trial that he had made any other false statements after having allegedly reformed himself; certainly there was no admission from Yamada as to any instance of his having wilfully made material false statements after his purported reformation. The picture of Yamada painted by the Government at trial was that of a man who, having made his plea bargain with the Government around mid-1972, was a truth-telling man who by the time of trial had reformed and was worthy of belief; the thrust of petitioners' defense to Yamada's testimony was that he was motivated to testify as he did by an eagerness to extend the scope of his "cooperation" with the Government and thereby reduce his own punishment for his previous offenses. The prosecution's portrayal of a reformed Yamada turned out to be blatantly untrue, as Yamada's new crimes established him to be a criminal so desperate to mitigate his own punishment as to be willing to fabricate any series of lies no matter how outrageous or fictitious so long as those lies were perceived by Yamada to be helpful to himself. Yamada himself, at his sentencing before Judge Lasker, finally admitted the depths of his desperation: " . . . I was irrational of every conceivable fear concerning prison life . . . " (A45).

Indeed, the District Court itself, in denying petitioners' motion for a new trial, conceded that Yamada had been portrayed by both himself and the Government at petitioners' trial as being a repentant man now worthy of belief. As the District Court acknowledged in its oral statement denying the motion for a new trial:

> "[C]ounsel for the defendants are right in saying that as of the time of trial he was saying in substance that he had reformed, and was then telling the truth . . ."

The Court's own questioning of Yamada during the trial highlighted this; when counsel for petitioners confronted Yamada with a portion of Yamada's S.E.C. testimony which was inconsistent with Yamada's trial testimony, the following colloquy occurred between the Court and Yamada:

> "Q. Was that at a time when you were giving false answers to the S.E.C.?
> A. That is correct." (T. Tr. 1630)

That the picture of a reformed Yamada painted by the Government at petitioners' trial was untrue is further borne out by Yamada's sentencing proceedings before Judge Lasker. There, Yamada's counsel, in Yamada's presence, stated:

> "Of critical importance is the fact that the crimes committed to which he stands sentenced today all occurred all prior to his imprisonment in Allenwood [which was subsequent to Yamada's testimony at appellants' trial]. I respectfully submit to this Court that he is a different man today. He is a different and rehabilitated man today then he was when he committed these crimes and then he

> was when he stood before Judge Cooper [which was also subsequent to Yamada's testimony at appellants' trial]." (A33)
>
> "We have a different man before this Court today than the man who wrote those letters" (A40).
>
> "[H]e is a different man than what he was when he submitted those letters to the Court. . . . [W]e have a man that is contrite and rehabilitated." (A44)

Indeed, the Government's own sentencing memorandum submitted to Judge Lasker indicated the Government's recognition of the absolute falsity of Yamada's alleged reformation and contrition as of the time Yamada testified at petitioners' trial. As the Government's memorandum stated:

> "[T]he fraud perpetrated by Yamada upon the Court represents the antithesis of cooperation or of genuine contrition for his past fraudulent activities. . . . [T]he fraud set forth above was anything but a frenzied last-minute act of panic. It was a calculated, well-thought out plan to deceive the court." (A62)
>
> "In submitting the fraudulent letters to Judge Cooper, Yamada demonstrated convincingly that he fully expected to manipulate the Court, just as he had previously manipulated the victims of his financial frauds." (A65).
>
> "With respect to a defendant who holds himself out as a contrite cooperating witness, it is especially intolerable." (A66)

Thus, the District Court, Yamada's counsel (in Yamada's presence), and the Government itself have all recog-

nized that Yamada, previous to his crimes before Judge Cooper—and including the time of his testimony against petitioners—held himself out as a repentant, contrite man ready to atone for his past crimes and worthy of credibility, and that this has been demonstrated beyond doubt to be completely false. Under these circumstances, it is respectfully submitted that Yamada's acts subsequent to his trial testimony can in no realistic sense be regarded as cumulative to his other crimes, as each of those other crimes was committed prior to his purported reformation, and there was no evidence available or introduced at trial to indicate that his contrition was, as it has subsequently been exposed to have been, a total fraud.

In addition, Yamada's scheme before Judge Cooper precisely paralleled what petitioners Zane and Silverman maintained at trial was his scheme against them. The Government, in its sentencing memorandum against Yamada, set forth at length certain comments made by Judge Cooper in imposing the original sentence upon Yamada. Judge Cooper, in imposing the original sentence, had stated to Yamada that a significant factor which Judge Cooper felt justified a two-year sentence was the fact that no testimonials had been presented to the Court on Yamada's behalf with respect to sentencing. Judge Cooper stated to Yamada:

> "[T]here are not testimonials such as was present yesterday [in a different case then pending before Judge Cooper] of moral deportment over a substantial period of time that came to stand besides those who had to stand sentencing yesterday. You haven't got them. They are not here. I can't look to a Yamada who did things of quality, who lent aid to those who were suffering; who dedicated a

period of time to uplift the neglected, the tormented. Absent." (A54)

The Government in its sentencing memorandum before Judge Lasker pointed out that in view of Judge Cooper's comments, Yamada "decided to concoct evidence of such charity in order to persuade Judge Cooper to reduce the two-year sentence." (55). The Government further stated in its sentencing memorandum that Yamada's "letters betray a deliberate effort to fabricate information which Yamada knew would commend themselves to Judge Cooper's attention." (A56).

The Government's argument to Judge Lasker regarding Yamada's fabrications in order to satisfy what Yamada felt was a need to supply testimony where none existed exactly paralleled petitioners' explanation for Yamada's testimony at trial. Based upon Yamada's testimony before the S.E.C. and his previous statements, it was petitioners' position that Yamada's testimony with respect to the Microthermal conspiracy and petitioners' alleged involvement therein was simply his attempt to broaden the scope of his "cooperation" with the Government in order to get the best possible deal for himself. In short, petitioners' position was that Yamada had testified truthfully before the S.E.C. with respect to his lack of knowledge concerning this conspiracy, and was committing perjury at trial—not, as Yamada claimed at trial, vice-versa. It is significant that Yamada himself admitted that he had not made his deal with the Government until mid-1972; that he knew, as of the time he made his deal, that Galanis had already accused two accountants named Zane and Silverman of participation in the Microthermal conspiracy; and that by virtue of having been served with an S.E.C. civil complaint which detailed, among other things, the alleged Microthermal conspiracy, Yamada knew of the al-

leged role which Galanis had ascribed to Zane and Silverman in Galanis' conversations with the S.E.C. attorneys (T. Tr. 1607-1610).

Thus, Yamada's lies to Judge Cooper, which the Government characterized as an attempt to supply false evidence where Yamada felt it could be helpful to him personally, were of extraordinary relevance to the position urged by petitioners at trial as to the depths of Yamada's motivation to supply false testimony and invent false relationships and non-existent events in order to fill what Yamada perceived as a vacuum.

The Court of Appeals' opinion disposes of this Court's *Mesarosh* decision with the observation that *Mesarosh*

> "did not involve a defense motion for a new trial but rather a sui generis exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General." (See Appendix A, at page 6a thereof.)

It is respectfully submitted that this overlooks the following controlling similarities between the two cases: in both cases the witnesses' credibility was wholly discredited by the new disclosures (in the instant case the disclosures were confirmed by Yamada's plea of guilty, whereas in *Mesarosh* the disclosure merely represented the Solicitor General's opinion); in both cases the new disclosures related directly to the witnesses' trial testimony (Yamada having claimed to be a reformed, now-honest man, an assertion for which the prosecutor vouched); and in both cases, the witnesses' lies were made in judicial proceedings. Moreover, this Court granted the accused a new trial in *Mesarosh* even in the absence of substantial additional circumstances which are present in the instant case: here, Yamada's perjury was committed within just

a few weeks of his testimony against petitioners (whereas in *Mesarosh* certain of the witness' lies were years removed from his trial testimony); and here, the evidence of Yamada's newest crimes bore directly upon Yamada's motive to lie at petitioners' trial, as it was undisputed that *both* during petitioners' trial and during the motion to reduce his own sentence before Judge Cooper, Yamada had been informed of what testimony might prove fruitful to Yamada in mitigating his own punishment.

The Court of Appeals' opinion, in attempting to distinguish *Mesarosh,* refers to none of these substantial similarities. The one purported distinction between the two cases upon which the Court of Appeals relies is that *Mesarosh* "did not involve a defense motion for a new trial" but an exercise of the Supreme Court's supervisory power "at the instance of representation submitted by the Solicitor General." (It is respectfully submitted that this is a distinction without a difference. The only conceivable relevance of whether the representation of the witness' perjury is made by the Government or by the defense is the degree of certainty of the perjury charged. In this case the newly discovered evidence which demonstrates the falsity of Yamada's testimony concerning his purported honesty, reformation, and veracity, although disclosed to the Court by the defense, was made by accusation of a federal grand jury acting under the guidance of the United States Attorney and was confirmed by Yamada's plea of guilty to six counts, whereas in *Mesarosh* the accusations against the Government's witness rested only upon the Solicitor General's assertions. Finally, in *Mesarosh* the Solicitor General stated to the Court that "the testimony given by [the Government witness] at the trial was entirely truthful and credible" (352 U.S. at 4); in the instant case, to the contrary, the United States Attorney has never stated subsequently to Yamada's most recent

indictment that Yamada's trial testimony was credible, or that Yamada will be called as a Government witness in any other cases in which he had been scheduled to testify for the Government; to the contrary, the Government has admitted that the new disclosures against Yamada have "substantially vitiated his usefulness as a Government witness in any future prosecutions." (A 61). The Government's reluctance to stand behind Yamada's credibility at this point is understandable, as Yamada's alleged credibility and reformation were thoroughly demonstrated by Yamada's own plea of guilty to have been blatantly false. Thus, in view of the certainty of the evidence of Yamada's new crimes, its disclosure to the Court by the defense rather than by the Government is a factor of no significance. *United States* v. *Chisum*, 436 F.2d 645 (9th Cir. 1971).

In view of these circumstances, it is respectfully submitted that petitioners Zane and Silverman are entitled to a new trial. Cf. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956). Yamada's most recent crimes cast substantial doubt on the validity of petitioners' conviction on the one count apiece (out of thirteen charged) upon which they were found guilty.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 110, 114—September Term, 1974.

(Argued October 1, 1974 Decided November 4, 1974.)

Docket Nos. 74-1678, 74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

PHILIP ZANE, JEROME E. SILVERMAN, and ROBERT S. PERSKY,

Defendants-Appellants.

Before:

MEDINA, ANDERSON and MANSFIELD,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge.*

Philip Zane, Jerome E. Silverman and Robert S. Persky appeal from an order denying a motion for a new trial on the ground of newly discovered evidence.

Affirmed.

Appendix A

JAMES E. NESLAND, Assistant United States Attorney, New York, N. Y., (Paul J. Curran, United States Attorney for the Southern District of New York, and John D. Gordan III, Assistant United States Attorney, New York, N. Y., on the brief), *for Plaintiff-Appellee.*

SANDOR FRANKEL, New York, N.Y., (Louis Bender, New York, N. Y., on the brief), for *Defendants-Appellants Philip Zane and Jerome E. Silverman.*

JOHN LOGAN O'DONNELL, New York, N. Y., (Charles M. McCaghey, Stephen Schlessinger and Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N. Y., on the brief), *for Defendant-Appellant Robert S. Persky.*

MEDINA, *Circuit Judge*:

On June 13, 1973 Philip Zane, Jerome E. Silverman and Robert S. Persky, two accountants and a lawyer, were convicted after a five-week trial to Judge Wyatt and a jury on one count of a multi-count indictment for filing a false Form 10K Annual Report for Microthermal Applications, Inc. with the SEC. We affirmed 495 F.2d 683, *cert. denied*, 43 U.S.L. Week 3239 (U.S. October 22, 1974). One of the defendants, Akiyoshi Yamada, pleaded guilty to a one-count indictment charging conspiracy to file the false report and he co-operated with the government. He gave extensive testimony implicating Zane, Silverman and Persky not only on the charge of which they were found guilty but on various other counts on which they were

acquitted. Less than four weeks after the conviction of Zane, Silverman and Persky, Yamada came before Judge Cooper on a motion to reduce the sentence imposed on him for the crime to which had pleaded guilty. In support of this motion five letters purportedly written by persons active in community affairs were submitted by Yamada to Judge Cooper. These letters, which testified to Yamada's good character and praised his work with drug addicts, were written by Yamada himself to influence Judge Cooper. Claiming that proof that Yamada had forged these letters and that he had engaged in such fraudulent and criminal conduct constituted newly discovered evidence, Zane, Silverman and Persky made a motion for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Judge Wyatt denied the motion from the bench remarking that Yamada's credibility had been fully explored at the trial, that the sending of the letters was merely cumulative evidence by way of impeachment and that such proof had no relevance to the issue of the filing of the false report with the SEC. He also found there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion with respect to the guilt of these appellants. This appeal is from the order of Judge Wyatt denying the motion for a new trial.

It requires no more than a brief recital of the law in this Circuit governing the function of the trial judge and that of this Court in connection with Rule 33 motions for a new trial on alleged newly discovered evidence to dispose of this appeal. In the exercise of his discretion the trail judge must determine whether there is a showing: (1) that the evidence could not with due diligence have been discovered until after the trial; (2) that the evidence

is material to the factual issues at the trial and not merely cumulative and impeaching, and (3) that the evidence would probably produce a different result in the event of a new trial. *United States* v. *Birrell*, 482 F.2d 890, 892 (2d Cir. 1973); *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States* v. *Polisi*, 416 F.2d 573, 576-577 (2d Cir. 1969). Less exacting standards, not relevant here, are required in cases involving prosecutorial misconduct or negligence. See, *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). The function of the Court of Appeals is to decide whether the trial judge has applied these criteria and whether his finding that the application of these criteria required a denial of the motion is or is not clearly erroneous. It is not our function to speculate on the possibility that a jury on a new trial might acquit the defendants. As we conclude that Judge Wyatt applied the proper criteria and that there is no tenable basis for holding that Judge Wyatt abused his discretion, or that his finding in applying the criteria was clearly erroneous, we affirm the order appealed from. It is especially important that this separate consideration of the respective functions of the trial judge and of an appellate court be made in Rule 33 cases involving long complicated trials.

It is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or not appellants were guilty of filing the false report with the SEC. Yamada had a lengthy history of involvement in fraudulent securities schemes. Prior to the trial of the appellants, Yamada pleaded guilty to three one-count indictments, one of which concerned the conspiracy to file a

false annual report for Microthermal. In return for co-operation with the government in the prosecution of the appellants, it was understood that the government would not proceed on other criminal offenses committed by Yamada, and also that the government would advise the court of his co-operation at the time of sentencing. At the trial. Yamada was subjected to thorough cross-examination. The basis of Yamada's co-operation, the criminal charges, and his numerous fraudulent securities schemes were brought out to impeach his credibility. In addition, Yamada testified to destroying documents and giving perjurious testimony before the SEC in the course of its investigation into Microthermal.

In support of his finding that the evidence of the forged letters would probably not result in any different decision by the jury on a new trial, Judge Wyatt referred to his recollection of the proofs and his instructions to the jury. We find no reason to disturb a finding based upon such reasoning. We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false. Indeed, at the time of the first trial he may have thought he had reformed.

Nevertheless, as we understand their arguments, appellants would have us develop some new law because of what they call the special circumstances of this case. Again and again appellants would have us reverse the decision below because Yamada's testimony at the trial and his forgery of the letters were supposed to be part and parcel of a deep-seated determination to resort to any means to keep out of jail. This is indeed novel doctrine and it would result in new trials whenever after a criminal trial the conduct of a defendant-turned-govern-

ment-witness indicated a desire to escape the toils of justice by any form of lying or skulduggery that could be made to appear similar to the alleged giving of false testimony at the trial in the hope of obtaining consideration for his co-operation with the prosecution.

Mesarosh v. *United States,* 352 U.S. 1 (1956), gives no support to the contentions of appellants here. It did not involve a defense motion for a new trial but rather a *sui generis* exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General.

The appellants place great emphasis on the fact that the forged and fictitious letters were submitted shortly after the conclusion of the trial resulting in the conviction of the appellants. This fact, however, does not alter the cumulative and impeaching character of these disclosures, nor does it provide an appropriate basis to distinguish this situation from other cases involving Rule 33 motions.

Affirmed.

APPENDIX B

Oral Opinion of Judge Wyatt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
73 Crim. 192

UNITED STATES OF AMERICA,

—against—

PHILIP ZANE, JEROME SILVERMAN, *et al.*,

Defendants.

The Court: It seems as if we are back to almost a year ago because I can remember Mr. Frankel and Mr. O'Donnell making arguments which were terribly persuasive in making one to decide in accordance with their arguments, but it frequently turned out that I didn't feel able to do so.

I have given this a good deal of consideration and I have read all the papers even the pleadings, and including the papers submitted this afternoon. However, I do not think I can grant this motion.

There are two motions, but they raise the same point, and that is that the admitted fraud of Yamata on Judge Cooper after his testimony at the trial in our case re-

quires a new trial. But, as I have said a moment ago, the situation here is that Yamata, of course, was not the only witness for the government.

As I have ample cause to remember—but I have not reread the transcript—his credibility was attacked and severely attacked and ably attacked, as was perfectly proper, and he was shown to be an accomplice, an admitted perjurer, and guilty of criminal offenses, and counsel for the defendants are right in saying that as of the time of trial he was saying in substance that he had reformed, and was then telling the truth, where shortly thereafter, he was back committing, in substance, perjury. I understand. Your points are well made.

But I still believe that since his credibility, as the Court of Appeals said, was thoroughly explored: the jury had before it the various felony charges that had been made against Yamata, the pleas of guilty, his perjury before the SEC, his hopes of leniency, and they were dealt with not only in his testimony but in summation, and I remember in my charge I gave—I have to say "standard" instructions, but I do have a usual formulation as to accomplice testimony and to testimony of those with prior criminal convictions, and I did call to the attention of the jury the fact the Yamata was an accomplice, that he had criminal records.

I know that I said also that he was an admitted perjurer; I think I may have done that at the request of one or more of the defendants. I told the jury that the testimony of accomplices and of those with criminal convictions and of those who admitted perjury should be viewed with great caution and scrutinized carefully, so I certainly impressed it on the jury what they had to do in weighing Yamata's testimony.

Appendix B

Therefore, it seems to me despite able presentation this afternoon, what he did before Judge Cooper, which seems not only fraudulent but foolish, but still, whatever it is, it seems to me to be cumulative on impeaching his credibility.

As I indicated, I have studied Mesarosh and certainly counsel for the defendants should have brought it to my attention. I do not think I knew the case before.

However, accepting the opinion of the Court, as I must, despite the three dissents, I must conclude that this is one of those instances to which the Court refers at 352 U.S. 9 where untruthful statements by a government witness subsequent to the trial are offered in support of a motion for a new trial as newly discovered evidence affecting his credibility at trial, and then, as I am sure you gentlemen have already read, the Court says, "such an allegation by the defense ordinarily will not support a motion for a new trial because new evidence which is merely cumulative for impeaching, is not, according to the often repeated statement of the Courts, an adequate basis for the grant of a new trial."

Therefore, I feel obliged to deny these motions, and since my statement of my reasons have been made a part of the stenographic transcript, I will simply, in due course, endorse the motion papers: motion denied for reasons stated in open Court.

Thank you very much, gentlemen, for coming.

APPENDIX C

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of December, one thousand nine hundred and seventy-four.

Present:

HON. HAROLD R. MEDINA,
HON. ROBERT P. ANDERSON,
HON. WALTER R. MANSFIELD,
Circuit Judges.

74-1678
74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON S. KAPLAN, PHILIP ZANE, JEROME E. SILVERMAN, CHARLES J. FISCHER, ROBERT S. PERSKY, RAMON N. D'ONOFRIO, U. S. SECRETARIAL INSTITUTE, LTD.,

Defendants,

JEROME E. SILVERMAN, PHILIP ZANE, ROBERT S. PERSKY,

Defendants-Appellants.

Appendix C

A petition for a rehearing having been filed herein by counsel for the appellants, Jerome E. Silverman and Philip Zane,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

Appendix C

Order of the United States Court of Appeals Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of December, one thousand nine hundred and seventy-four.

74-1678

74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON S. KAPLAN, PHILIP ZANE, JEROME E. SILVERMAN, CHARLES J. FISCHER, ROBERT S. PERSKY, RAMON N. D'ONOFRIO, U. S. SECRETARIAL INSTITUTE, LTD.,

Defendants,

JEROME E. SILVERMAN, PHILIP ZANE, ROBERT S. PERSKY,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the Appellants, Jerome E. Silverman and Philip Zane, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

WILFRED FEINBERG
Acting Chief Judge

APPENDIX D

Federal Rules of Criminal Procedure

RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Appendix D

Statutory Provisions Involved

Title 15, United States Code, §78o

Over-the-counter markets; registration of brokers; information and reports

. . . (d) Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78l of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78l of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the hold-

ers of which enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

Title 15, United States Code, §78ff

Penalties

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every

day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78*o* of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

Title 18, United States Code, §2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18, United States Code, §371

Conspiracy to commit offense or to defraud United States

Appendix D

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, United States Code, §1505

Obstruction of proceedings before departments, agencies and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with

any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, §1621

Perjury generally

Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be

fined not more than $2,000 or imprisoned not more than five years or both. This section is applicable whether the statement or subscription is made within or without the United States.

17 C.F.R. §240.15d-1

Requirement of annual reports.

Every registrant under the Securities Act of 1933 shall file an annual report, on the appropriate form authorized or prescribed therefor, for the fiscal year in which the registration statement under that Act became effective and for each fiscal year thereafter, unless the registrant is exempt from such filing by section 15(d) of the Securities Exchange Act of 1934. Annual reports shall be filed within the period specified in the appropriate report form. At the time of filing the annual report, the registrant shall pay to the Commission a fee of $250, no part of which shall be refunded.

17 C.F.R. §240.12b-20

Additional information.

In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.